No. 11025

In the United States Circuit Court of Appeals for the Ninth Circuit

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLANT

v.

CRAWFORD AND DOHERTY FOUNDRY COMPANY, AN OREGON CORPORATION, APPELLEE

APPELLANT'S BRIEF

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INDEX

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JURISDICTION

This is an appeal by the Price Administrator from a final judgment of the United States District Court for the District of Oregon, dismissing an action brought under Sections 205 (e) and 205 (a) of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App. Sec. 925) for statutory damages and to restrain defendant from further violating the Act and Regulations issued thereunder.

The judgment dismissing the action was entered December 21, 1944 (R. 27). Notice of Appeal was filed February 24, 1945 (R. 28–29). Jurisdiction of the District Court was invoked under Section 205 (c) of the Act (50 U. S. C. App. Sec. 925 (c)) and jurisdiction of this Court is invoked under Section 128 of the Judicial Code (28 U. S. C. Sec. 225).

PROVISIONS OF THE ACT AND REGULATIONS

The action involves the Emergency Price Control Act of 1942 (50 Stat. 23, 50 U. S. C. App. Sec. 925) as amended, and two Regulations issued thereunder, the General Maximum Price Regulation (7 F. R. 3153) effective May 11, 1942 (hereinafter referred to as the GMPR) and Maximum Price Regulation No. 244 as amended (7 F. R. 7871) effective October 26, 1942 (hereinafter referred to as MPR 244). The pertinent provisions of the Act and Regulations are printed in the appendix to this brief (pp. 55 to 62). The alleged violations are overcharges in the sale of gray iron castings from May 11, 1942, until March 11, 1943. The GMPR (a general freeze regulation) fixed maximum prices for this commodity from May 11, 1942, until October 26, 1942, at which time it was superseded by MPR 244.

STATEMENT OF THE CASE

Defendant is a manufacturer in Portland, Oregon, of gray iron castings. As such, it was without dispute from May 11, 1942 until October 26, 1942 subject to the General Maximum Price Regulation issued by the Price Administrator, and thereafter until the present day subject to Maximum Price Regulation 244.

The GMPR (general freeze regulation effective May 11, 1942) froze prices of thousands of commodities, including gray iron castings at the highest price charged for that commodity in *March 1942.* MPR No. 244 effective October 26, 1942, was intended to roll back prices to purchasers of gray iron castings to the highest price at which the castings were sold

to the same purchasers during the period from *August 1, 1941 to February 1, 1942* inclusive.

From the time the GMPR became effective in May 1942 and for about six months after MPR 244 went into effect in October 1942, defendant made little, if any, effort to comply with these Regulations in its sales to customers. In the summer of 1942 the District Office of the Office of Price Administration in Portland, Oregon, received information from one of defendant's substantial customers that defendant had raised its prices in April 1942 (Pltf.'s Exh. 6, R. 115). Soon thereafter informal discussions took place between representatives of the Office of Price Administration and defendant, as to what the legal and orderly course was in order to raise prices (R. 218–219). As early as September 1942, when defendant had still done nothing to comply with the GMPR, it was advised by letter that ceiling prices "can be increased only on the basis of an application for adjustment" and that defendant as a supplier of castings necessary for the war effort would qualify for adjustment under Procedural Regulation No. 6[1], which provides the procedure for the adjustment for maximum prices for commodities and services under government contracts and subcontracts (R. 256–257, Deft.'s Exh. 33). The letter went on to say "This Regulation permits you to sell at the increased price requested to be established as the ceiling *upon the filing* of the application." (Italics ours) (R. 257).

The defendant apparently paid no heed to this letter or to previous warnings, and not only continued

[1] See infra, p. 45.

to charge prices in excess of the maximum established for gray iron castings by GMPR and also by MPR 244 which superseded it on October 26, 1942, but even delayed filing its application for an adjustment until March 10, 1943, fully six months thereafter. In view of defendant's persistent refusal to abide by price control, the instant action was commenced on July 31, 1943. Three causes of action were alleged (R. 2–7):

A. The Complaint

(1) That defendant violated Revised Price Schedule No. 4 (which establishes maximum price for various grades of iron and steel scrap) by purchasing scrap at prices in excess of those established by the Schedule (R. 3). This cause of action was abandoned upon the trial (R. 33, 77).

(2) The second cause of action charged sales made by the defendant of gray iron castings in violation of the GMPR and MPR No. 244. These sales covered two periods, those made during May 11, 1942, and until October 26, 1942 (Paragraph IV of complaint, R. 4), and those sales covering the period from October 26, 1942, to March 11, 1943 (Paragraph VI of complaint, R. 5).

(3) For the third cause of action, the Administrator sought treble damages pursuant to the provisions of Section 205 (e) of the Act amounting in the aggregate to $48,505.62 (R. 6).

As relief, the Administrator prayed for judgment in that sum and also for an injunction restraining further sales in violation of the Act and Regulations issued thereunder (R. 7).

B. The Answer

In its second amended answer, the defendant denied generally the specific allegations of wrongdoing charged in the complaint and alleged the following affirmative and separate offenses (R. 8–17):

(1) That prior to March 31, 1942, defendant had fixed its prices for its commodities based upon the cost of material and labor fixed by agreement existing at that time; that thereafter on August 29, 1942, a new agreement was negotiated fixing a wage rate which became retroactive to April 1, 1942; that based on the increased cost of labor the defendant put into effect certain higher prices; that in fixing such prices defendant was compelled to adjust them in order to avoid the consequences of selling its commodities for prices less than the actual cost of production and that such consequences were due entirely to considerations beyond its control (R. 10–11).

(2) That on or about November 10, 1942, soon after the issuance of MPR 244, the defendant, by its Secretary-Treasurer D. B. Card, conferred with the Chief Enforcement Attorney of the Office of Price Administration, Portland, Oregon, in regard to preparing and filing a protest to that Regulation; that the Chief Enforcement Attorney advised the defendant that any protest for adjustment would not be effective unless accompanied by a tender to the Office of Price Administration of the amount of money which it claimed to be owing on overcharges theretofore made to certain purchasers; that the defendant was "prevented" or "induced" not to file such protest because of this advice or information; and that therefore the plaintiff

should be estopped from making any claim against defendant on account of alleged violations of the Regulation subsequent to the date of said advice, viz, November 10, 1942 (R. 11–14).

(3) That the individuals who subscribed their names as attorneys for the plaintiff in this action instituted the action without proper authority from the Administrator and that the action is being prosecuted without authority of the latter (R. 14).

(4) That the sales made by the defendant subsequent to the effective date of MPR 244 to the purchasers named in the complaint were effected through an agreement by which the commodities were invoiced at higher prices which defendant claimed it was entitled to charge under the Regulation with the understanding, however, that the amount of each invoice representing the excess over the price fixed by the Regulation would be withheld by the purchaser pending the final determination of defendant's application for an adjustment; and that defendant's action in fixing said price was not a wilful violation or disregard of the Regulation, nor was this price the result of defendant's failure to take practicable precautions against a violation (R. 15).

(5) That all of the castings which were sold to the purchasers named in the complaint were substantially of the same quality, grade, design, specification, and weight of those sold to purchasers generally located in the same area and that therefore all of these purchasers were "in the same class," even though they were charged different prices during the base periods; and that all such prices were fixed by defendant's of-

ficers in good faith and with intention of complying with the Regulation (R. 15–16).

After answer but prior to trial, defendant's application for an adjustment was denied by the Administrator and this determination was upheld by the Emergency Court of Appeals (146 F. 2d 661). Despite the denial of an adjustment, defendant continued to adhere to its practice of adjustable prices until the trial, and refused and presumably in view of the lower court's holding still refuses to revise its prices downward as required by the Regulation, where an adjustment is denied.

C. The Findings

After a trial of the issues, the Court substantially found in pertinent part as follows:

A. *As to alleged violations under the GMPR* (August 1, 1942, to October 26, 1942).—(1) That during August 1, 1942, and October 26, 1942, defendant's sales of castings were governed by the GMPR (Finding 4, Tr. R. 20) and that its maximum prices under this Regulation were the highest prices charged for the same or similar casting sold during the month of March 1942 to a purchaser of the same class (Finding V, R. 21).

(2) That during the month of March 1942 defendant sold similar castings to Tuerck-MacKenzie Company, Bingham Pump Company, Willamette Iron and Steel Corporation and Iron Fireman Manufacturing Company (hereinafter referred to as the Purchasers) and also to Marine Electric Co. (hereinafter referred to as Marine); that all these purchasers were of the same class; and that the prices charged

the Purchasers during August 1, 1942, to October 26, 1942, did not exceed the highest prices charged Marine during March 1942 (Finding VI, R. 21).

B. *As to alleged violations under MPR 244* (October 26, 1942, to March 10, 1943).—(1) That during October 26, 1942, and March 10, 1943, defendant's sales and deliveries were governed by MPR 244 and that its maximum prices under this regulation was the highest net price at which it delivered substantially the same casting to the particular purchaser during the period August 1, 1941, to February 1, 1942 (Finding VII, R. 22).

(2) That on or about April 13, 1942, defendant increased its price schedule to Tuerck-MacKenzie and Bingham Pump Company to prices above those previously charged these purchasers for similar castings; that in November 1942, defendant entered into adjustable price contracts (to be discussed hereafter) with these purchasers under which invoices would be rendered on the basis of the new price, but pending the determination of the validity of defendant's increased price schedule, the difference between the amount shown by the invoice and the price in effect prior to revision would be withheld by the purchasers; and since November 1942 defendant has continued this practice and made deliveries of castings pursuant to such agreement (Finding VIII, R. 22).

(3) The difference in amount at which castings were invoiced over the prices fixed by MPR 244 so far as Tuerck-MacKenzie was concerned for the period in question was $1,784.06 (Finding IX, R. 23) and so far as Bingham Pump Company is concerned

was $3,269.38, both of which sums have been withheld by each purchaser (Finding X, R. 23).

(4) That on or about October 20, 1942, defendant increased its price schedule to Willamette Iron & Steel Corporation retroactive to March 1, 1942; and in November 1942 defendant entered into an adjustable price arrangement with this purchaser similar to the one referred to above (Finding XI, R. 23, 24) and that the difference in amount at which prices were invoiced over the prices fixed by MPR 244 was $3,646.20, which amount was also withheld by this purchaser pursuant to arrangement (Finding XII, R. 24).

(5) That during October 26, 1942, to December 31, 1942, defendant sold and delivered castings to Iron Fireman Manufacturing Company; that such sales were made at prices not in excess of the maximum prices as established by MPR 244 for the same castings as were sold during that period to Marine (Finding XIII, R. 24, 25); also that Iron Fireman and Marine were purchasers of the same class and that the prices charged Iron Fireman did not exceed the prices charged Marine during August 1, 1941, to February 1, 1942 (Finding XIV, R. 25).

As a general finding, the Court found that "during all said times" the violations by defendant were neither wilful nor the result of failure to take practicable precautions against the occurrence of the violations (Finding XV, R. 25). And finally, the Court found that the bringing of the action was not authorized by the Administrator (Finding XVI, R. 26).

As a conclusion of law the court gave judgment for the defendant, dismissing the action (Conclusion of Law I, R. 26) and indicated that the Administrator's prayer for injunctive relief likewise fell at the same time (R. 290). From a judgment to this effect (R. 27) this appeal was taken (R. 28). The issues here are:

D. The Issues

(1) Was the court correct in refusing to grant relief for violations of the GMPR because of its belief that purchasers were of the same class when they bought similar castings, even though the GMPR provides, and has been consistently interpreted to mean, that purchasers who paid different prices during the base period are not in the same class; and

(2) was the court correct in refusing to grant relief for violations of MPR 244 because of its belief that the prices paid by the Purchasers were no higher than those paid by Marine for the same or similar castings during the base period of that regulation, even though MPR 244 provides that the maximum price for such castings shall be the highest net price paid by a particular purchaser at that time.

All that is involved on this appeal, therefore, is a question of the proper construction of the Regulations.

SPECIFICATIONS OF ERROR

(1) The Court erred in dismissing the action (Conclusion of Law I, R. 26).

(2) The Court erred in failing to award judgment in favor of appellant as prayed for in the complaint.

(3) The Court erred in refusing to grant the injunction as prayed for in the complaint (R. 290).

(4) The Court erred in finding as a fact or concluding as a matter of law that Marine Electric Company was a purchaser of the same class as Tuerck-MacKenzie Company, Bingham Pump Company, Willamette Iron and Steel Corporation, and Iron Fireman Manufacturing Company (Findings VI, R. 21).

(5) The Court erred in failing to find that defendant violated the General Maximum Price Regulation in its sales made to Tuerck-MacKenzie Company, Bingham Pump Company, Willamette Iron and Steel Corporation, and Iron Fireman Manufacturing Company during the period August 1, 1942, to October 26, 1942 (cf. Finding VI, R. 21).

(6) The Court erred in failing to hold and conclude as a matter of law that even if adjustable price agreements or arrangements had been made as set forth in Findings of Fact VIII and XI, defendant violated Maximum Price Regulation 244 by selling or delivering commodities accompanied by or under invoices showing prices higher than those permitted by said regulation (Findings VIII, R. 22; XI, R. 23, 24).

(7) The Court erred in failing to find that defendant violated Maximum Price Regulation 244 in the sales made to Tuerck-MacKenzie Company, Bingham Pump Company, Willamette Iron and Steel Corporation, and Iron Fireman Manufacturing Company during the period October 26, 1942, to March 10, 1943 (cf. Findings VIII to XIV, R. 22–25).

(8) The Court erred in failing to find that defendant was in violation of Maximum Price Regulation 244 up to the day of the trial.

(9) The Court erred in finding that during all of the period from August 1, 1942, to March 10, 1943, the violations of the defendant were neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation (Finding XV, R. 25).

(10) The Court erred in failing to grant judgment for treble damages as prayed for in the complaint.

(11) The Court erred in finding as a fact and concluding as a matter of law that the attorney or attorneys who instituted this action on behalf of appellant were without authority to do so (Finding XV, R. 25).

(12) The Court erred in refusing to grant plaintiff's motion for an order striking from defendant's second amended answer all of the allegations contained in defendant's affirmative answers and defenses (R. 17).

SUMMARY OF ARGUMENT

As a dealer in gray iron castings, defendant was subject to the General Maximum Price Regulation from May 11, 1942, until October 26, 1942, and thereafter to the Maximum Price Regulation No. 244 which superseded it. The GMPR limited the price which any seller might charge for gray iron castings to the highest price which he charged for that commodity to a purchaser of the same class during the base period, which is the month of March 1942; MPR 244 limited the ceiling price to the highest price which the seller charged a particular purchaser during the base period, which is August 1, 1941, to February 1, 1942. Under the plain language of the GMPR and MPR 244, and

of the administrative interpretations which consistently have been placed upon them, as well as the construction given them by this Court and by two other Circuit Courts of Appeals, a practice adopted by the seller of charging different customers different prices for the same commodity is sufficient by itself to put each in a separate class, even though they buy similar products. When defendant, having adopted such a practice in its base period, increased its price to some of its customers over the prices which it charged to the same customers in the base periods, it violated each of these Regulations. In dismissing this action, the District Court has condoned the defendant's unlawful practice, and under its decision the defendant is now in violation and will continue to disregard MPR 244. Judgment should have been granted for full statutory damages in treble the amount of the overcharges, and injunctive relief as prayed for in the complaint should issue.

ARGUMENT

I

Defendant plainly violated the applicable regulations

This case hinges on a determination of what the Administrator meant by the words "purchaser of the same class" as used by the General Maximum Price Regulation and by the words "such purchaser" as used in Maximum Price Regulation 244. It is the contention of the Administrator that under a plain reading of these Regulations and based on a consistent series of administrative interpretations and

judicial decisions, purchasers are not of the same class where they have paid different prices to the seller during the base period established by the Regulations. It is the contention of the defendant that the words "purchaser of the same class" should be construed as meaning purchasers of the same kinds of material, qualities, grades or specifications who in a *general* sense are in the same class (R. 15–16). It is the further contention of the defendant that if the Regulation compels the continuance of a price to a particular customer paid by the latter during the base period, regardless of what the general price was, that it is "entirely illegal" as being "beyond the power of the Administrator" (R. 246). For a determination of these and the other issues we must look to the Regulations involved in this case, to the interpretations of these Regulations given to them by the Administrator and to the construction placed upon them and the Act by the Courts.

A. The regulations and interpretations of the Administrator

Section 2 (b) of the GMPR (applicable to the alleged violations during August 1, 1942, to October 26, 1942, Finding of Fact IV, R. 20), declares that "the 'highest price charged' shall be a price charged during March 1942 to a purchaser of the same class". (See, infra, p. 58.) Section 20 (k) defines "purchasers of the same class" by reference to "the practice adopted by the seller in *setting different prices* for commodities or services *for sales to different purchasers* or kinds of purchasers * * *". [Italics ours.] Appendix A of Section 1421.166 of MPR 244 (applicable to the alleged violations during October 26,

1942, to March 10, 1943 (Finding of Fact VII, R. 21–22), provides that any casting sold after the base period which is identical with a casting sold during the base period is frozen to the highest price at which the casting was sold, with this proviso, however, that if a casting is sold to the *same* customer, the price charged to that customer during the base period becomes the maximum price on a subsequent sale to *such* customer, even though the casting was sold at higher prices to *other* customers during the base period.

The price criterion is therefore not only made as clear as language can make it under the provisions of both these Regulations, but it is also fortified by official interpretations of them. Thus the official interpretation of the GMPR on August 20, 1942 (OPA Serv. 11: 968–9), stated the following:

> Frequently, of course, a seller may have had the practice of giving a customer special low prices with the complete absence of any criteria which can be objectively applied. Thus a seller may have customarily given one customer—who by all objective tests was exactly like many other customers—a special low price out of friendship, or habit, or whim, or because the particular customer was exceptionally good at haggling. In such a case, *this buyer is in a separate class by himself; his class was established by the seller's practice of giving him a lower price.* However, because the criterion (friendship, habit, whim, ability to haggle, etc.) is one which cannot be objectively applied or duplicated and depends primarily on the seller's emotions, the class is "nonadmissible." Other persons need not be admitted to the class, even though they

> claim, for example, to be as good friends of the seller as the favored buyer. The criterion of friendship is not one which OPA can be expected to apply. By the same token, however, OPA cannot be expected to pass upon the disappearance of the subjective criterion. The "friend" is in a separate class and entitled to a lower price even though amicability disappears and the "friends" come to blows. (Of course, the seller can always refuse to sell to his "friend" at any price.) Fundamentally, the one criterion capable of objective delineation and application was that this *particular* seller did customarily get a *lower* price, and it is this criterion which *must be continued.*
>
> Accordingly, a view, sometimes expressed, that classes can be established only if a "business reason" exists for the classification *is not well founded.* [Italics added.]

On September 22, 1942, the Administrator once again issued an official interpretation on the phrase "purchasers of the same class" used in the GMPR giving the following illustration:

> Thus if a laundry customarily charged two customers different prices at the same time the two customers are in separate classes even if one customer sometimes paid more than the other and sometimes less (OPA Serv. 11: 969).

Similarly MPR 244 contains an official interpretation to the same effect. This interpretation appears in a simple example in footnote 11 of Section 1421.166 of Appendix A as follows (see, infra, pp. 61–62):

> Examples of the method of computing base-period maximum prices are as follows: Assume

> that the seller sold or offered for sale in the period between August 1, 1941, and February 1, 1942 (hereinafter referred to as the "base-period"), to purchasers A and B, but not to purchaser C, a casting which is identical to the casting to be priced and that the highest net prices to purchasers A and B in the base-period were 7¢ and 8¢ per pound, respectively. If the seller proposes to sell the casting to C, his maximum price is 8¢ per pound (subject to the provisions of § 1421.166 (a) (3) on overtime). *The seller's maximum price to purchaser A would be 7¢ per pound and to purchaser B would be 8¢ per pound* (subject to the provisions of § 1421.166 (a) (3) on overtime). [Italics ours.]

In view of the importance of definiteness and certainty in the application of the price regulations, the Administrator at the very inception of price control adopted the practice of issuing in writing, on request from any persons affected by a regulation, interpretations thereof which were binding on him until revoked. In the large number of interpretations which have been issued in this manner the position has been uniformly and consistently taken that price differences for different purchasers during the base period placed them in different classes of purchasers.

By the process which has been described, the established construction of the Price Administrator has been woven into the fabric of the regulation. Millions upon millions of individual transactions have been settled upon the basis of it. That construction can thus claim for itself all the weight to which settled practice in human affairs is entitled. It is supported not merely by the presumed expertness of an admin-

istrative agency in determining the meaning of its own regulation. It is supported, even more importantly, by the fact that it has been outstanding and constantly applied and reapplied in innumerable transactions. The guiding principles of interpretation under such circumstances were stated by the Supreme Court recently in *Bowles* v. *Seminole Rock & Sand Co.*, — U. S. —, 65 S. Ct. 1215, as follows:

> The problem in this case is to determine the highest price respondent charged for crushed stone during March 1943 within the meaning of Maximum Price Regulation No. 188. Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.[2] The legality of the result reached by this process, of course, is quite a different matter. In this case the only problem is to discover the meaning of certain portions of Maximum Price Regulation No. 188. Our only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator.

[2] So far as the phrase "purchaser of the same class" in the GMPR is concerned, there can be little question of the correctness of the Administrative interpretation since three Circuit Courts of Appeal have accepted it as binding. (See infra, p. 20.)

The court below, however, did not even refer to this settled administrative construction of the regulation but alluded to the Price Administrator's view as if it were a position taken for the first time in this lawsuit. The court then proceeded to consider the language of the Regulation but impressed its own gloss upon it. This was plain error. Whatever qualifications there may be upon the rule which attributes weight to a settled administrative construction, such a construction cannot be ignored even when it involves only the Administrator's views as to the meaning of the statute under which he is operating (*Skidmore* v. *Swift & Co.,* 323 U. S. 134, 137–140). The weight to be given to his construction of his own regulations should obviously be much greater; for then he is explaining his own intention, not that of Congress. The Supreme Court has gone so far as to say that the latter type of "interpretation is binding upon the courts"; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 143; cf. *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 315; see also, *Bowles* v. *Glick Brothers Lumber Co.,* 146 F. 2d 566, 568, footnote 2 (C. C. A. 9th, 1945) cert. denied 65 S. Ct. 1554, and is of "controlling weight unless it is plainly erroneous or inconsistent with the Regulation" (*Bowles* v. *Seminole Rock & Sand Co., supra*).

It is not necessary to go that far here, however, inasmuch as the construction adopted by the court below is wholly without merit. As has been seen, the language of the regulation is plain and compels

the construction placed upon it by the Price Administrator.

B. The authorities

The construction urged by the Administrator has received judicial approval in each instance where this question was raised in a Circuit Court of Appeals. In *Bowles* v. *Nu Way Laundry Co.,* 144 F. 2d 741 (C. C. A. 10th, 1944), cert. denied 65 S. Ct. 431, the court construing the phrase "purchaser of the same class" under Maximum Price Regulation 165, which governs prices for various services, and the GMPR said (p. 747):

> * * * In other words, the test is not necessarily whether customers were purchasing the same service in the same area during the same period of time, but whether the said purchasers were paying the same prices for the same services during the base period. * * *

So, too, in *Rainbow Dyeing and Cleaning Co., Inc.,* v. *Bowles,* 150 F. 2d 273 (App. D. C., 1945), the Court likewise had occasion to construe the words "purchaser of the same class" and held that "a seller's practice 'in setting different prices * * * to different purchasers' puts each purchaser who pays a different price according to this practice in a different 'class.'" And this Court in *Bowles* v. *Wheeler,* —— F. 2d —— (C. C. A. 9th, August 1, 1945), came to the same conclusion in its construction of the phrase "purchaser of the same class" as it appears in General Maximum Price Regulation and Maximum Price Regulation 165 relating to logging services.

Judge Bone said:

> Applying the regulations to the facts disclosed by the record, we are convinced that appellee's customers, as of March 1942, and subsequent thereto, were not purchasers of the same class, but were set in different price classes according to economic conditions and appellee's own need for business at the time they became his customers. His own testimony shows this.
>
> The Administrator's interpretation of the Maximum Price Regulation No. 165 as to "purchasers of the same class" was upheld in *Bowles* v. *Nu Way Laundry,* supra. The court found that under applicable regulations (General Maximum Price Regulations, Section 20 (k), applicable from February 1, 1943, to June 23, 1943) and Maximum Price Regulation 165 (applicable June 23, 1943, to September 30, 1943) all of appellee's customers during March 1942, and during February 1, 1943–September 30, 1943, were purchasers of the same class, and therefore, since the price range for appellee's customers as of March 1942 was 60¢ to 80¢, any change of rates by appellee within the limits of these figures would not violate the regulations. Section 20(k) of the General Maximum Price Regulation defines "purchaser of the same class" by reference to "the practice adopted by the seller in setting forth prices for commodities or services for sales to different purchasers or kinds of purchasers." A similar definition occurs in Maximum Price Regulation 165.
>
> Both of the above regulations were clearly interpreted by the Administrator as to the meaning of the phrase "purchasers of the same

class." See for G. M. P. R., Pike and Fischer, O. P. A. Service, pp. 11:968,9; for M. P. R. 165, "Manual No. 2 under Maximum Price Regulation 165—Services", p. 21, Pike and Fischer, O. P. A. Service, p. 15:819. Illustrative of the Administrator's interpretation is this sentence taken from the "manual":

"Whether one class of customer is or is not the same as another class depends principally on your own business practice. If you customarily recognized one class as differing from another by charging different prices, you will be required to continue treating them as different classes."

The regulations seem clear, but if ambiguous, the Administrator's interpretation, as indicated above, is entitled to great weight. Compare *Consolidated Power & Paper Co.* v. *Bowles,* 146 F. (2d) 492 (Em. Ct., 1944); *Bowles* v. *Seminole Rock & Sand Co.,* No. 914, June 4, 1945, — U. S. —; *Bowles* v. *Nu Way Laundry,* supra.

Unless these well-considered rulings are now to be set aside or ignored, there is no escape from the conclusion that the District Court erred in holding that the purchasers named in the complaint were of the same class as the Marine Electric Company[3] (Finding VI, R. 21; Finding XIV, R. 25), and in dismissing the complaint for that reason.

[3] The prices charged during the base period to Marine Electric Co., who on defendant's own admission "were never big users" (R. 183) were consistently higher than the cost to other purchasers (R. 192). It was not merely a chance, sporadic pricing practice, but obviously based on the ground that during 1941 and up to January 1942 Marine Electric was only an "occasional" purchaser to the extent of $180.00 per month (R. 260) compared to the other purchasers like Tuerck-MacKensie and Bingham who were purchasing between $2,000 and $5,000 per month (R. 156–157, 160).

It remains only to consider the contentions of the defendant raised either by answer or during the trial.

CONSIDERATION OF CONTENTIONS RAISED BY DEFENDANT

I

The first affirmative defense raised by defendant was that prior to March 31, 1942, defendant had fixed its prices for its commodities based on the cost of material and labor fixed by agreement existing at that time; that thereafter on August 29, 1942, a new agreement was negotiated fixing a wage rate which became retroactive to April 1, 1942; that based on the increased cost of labor the defendant put into effect higher prices and, in fixing such prices, was compelled to adjust them in order to avoid the consequences of selling its commodities at prices less than the actual cost of production; and that such consequences were due entirely to considerations beyond the control of the defendant (R. 10, 11).

1. This is a claim of hardship which the court below was barred from considering, since it is a matter which Congress has reserved exclusively for the determination of the Emergency Court of Appeals (*Yakus* v. *United States,* 321 U. S. 414). "If the hardships recognized by the trial court as constituting the basis for a denial of the injunction [the only relief requested] are disproportionate to the common burden of a wartime economy the remedy is adequately provided elsewhere in the Act (Sections 203 (a) and 204 (a), (b), (c), (d), and not in the trial court)" (*Bowles* v. *Nu Way Laundry Co., supra,* 144 F. 2d at p. 748).

2. The same objection can be made to defendant's contention, couched in somewhat different language, that it was beyond the power of the Administrator to continue a price to a particular customer regardless of what the general price was and that, therefore, so far as that part of the Regulation is concerned "it is entire illegal" (R. 246). Obviously, this objection also constituted a challenge to the validity of the price-fixing regulation which was a matter solely for the Emergency Court of Appeals (*Rosensweig* v. *United States,* 144 F. 2d 30 (C. C. A. 9th, 1944), cert. denied 65 S. Ct. 117; *Taylor* v. *United States,* 142 F. 2d 808, 817 (C. C. A. 9th, 1944), cert. denied 65 S. Ct. 56; *Bowles* v. *Sanden and Ferguson,* 149 F. 2d 320 (C. C. A. 9th, 1945); *Bowles* v. *Meyers,* 149 F. 2d 440 (C. C. A. 4th, 1945)).

3. The fact is, as the Emergency Court of Appeals ultimately held, there was no merit whatever in defendant's claim for adjustment. The Emergency Court of Appeals pointed out that the defendant's profit, while only about 2% on sales in 1942, rose to over 12% on sales in the first half of 1943, and that the defendant's net income on sales for the first half of 1943 amounted to over 100% on the par or stated value of its capital stock. Upon that record the court said that the Administrator's action in denying the application for adjustment was neither arbitrary nor capricious (*Crawford & Doherty Foundry Co.* v. *Bowles,* 146 F. 2d 661 (E. C. A. 1944)) and on this trial too, defendant admitted a substantial increase instead of a decrease in its earnings (R. 189).

II

The second affirmative defense was that on or about November 10, 1942, following the issuance of MPR 244 (on October 21, 1942), defendant by its Secretary-Treasurer, D. B. Card, conferred with the Chief Enforcement Attorney of the Office of Price Administration at Portland, Oregon, in regard to filing a protest to such Regulation and was advised that an application for adjustment would be unavailing unless defendant tendered a settlement of sums alleged to be owing to certain purchasers because of overcharges since the effective date of the Regulation; that defendant in good faith relied on these representations and was induced not to file a protest; and that plaintiff should be estopped from making any claim on alleged violations subsequent to November 10, 1942, the date of the advice (R. 11–14).

While this excuse for failing to comply with the Regulation bears the earmarks of plausibility, it does not withstand analysis.

1. In the first place defendant provides no explanation at all for its failure and refusal to adhere to price ceilings from May 1942 until November 1942. During this period defendant was urged repeatedly to file an application for adjustment under the GMPR and Procedural Regulation 6 but did not do so. During July 1942 when defendant's violation came to the attention of the OPA, conferences were held by a representative of the OPA with Mr. Card for the purpose of obtaining defendant's compliance with the GMPR (R. 264–265). These efforts were exerted to no avail. On

September 14, 1942, defendant was advised by letter that the March base period provided by the GMPR controlled its sales to Willamette Iron and Steel Company and the Iron Fireman and that "this price can be increased only on the basis of an application for adjustment" (Deft's Exh. No. 33, R. 255); and that since the castings are produced for installation in ships being constructed on contract with the government "you would qualify for adjustment under Procedural Regulation No. 6 (R. 257). Yet despite this advice, defendant not only continued to violate the Regulation but did absolutely nothing about filing its application for adjustment until March 10, 1943, more than six months thereafter.

True, when defendant finally filed its application for adjustment it was advised on March 12, 1943, by MacCormac Snow, Chief Enforcement Attorney of the OPA, that the adjustment application "could not be acted upon to permit you to quote the prices you request in your application" until a satisfactory adjustment was made on past overcharges (R. 255). But by April 2, 1943, only three weeks later, this condition was withdrawn and defendant was told that it could charge the prices requested in the application under Procedural Regulation No. 6 (R. 254). It thus appears that any misconception that was suffered by Mr. Card was confined at most to about three weeks from March 12, 1943, to April 2, 1943. But how does this explain defendant's continued violations from April 1942 to this day and failure for approximately nine months to take the remedial steps urged upon it?

It would perhaps be a mitigating factor if defendant violated for the first time after it received the erroneous instructions from Mr. Snow on March 12, 1943. Here, however, the defendant was not only a consistent violator prior to the instructions sent at that time but even continued to violate the Regulation after it received correct advice. It is, therefore, clear that defendant's inaction and defiant disregard of the Regulations during the period mentioned in the complaint was not influenced at any time by any of the advice received from the Office of Price Administration (cf. *Rainbow Dyeing & Cleaning Co., Inc.,* v. *Bowles, supra,* footnote 4).[4]

2. Secondly, there are no charges of violation in the complaint for any period beyond March 10, 1943, so we fail to see how defendant was prejudiced by a statement made to it on March 12, 1943.

3. Third, since Mr. Snow was not one of those persons named in Revised Procedural Regulation No. 1,[5]

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[4] "In July 1943 an OPA inspector erroneously told appellant that its price increases were lawful. But appellant made the increases before it got this erroneous advice, and continued them in effect after it got correct advice. It is therefore clear that the increases were not due to the erroneous advice. Appellant does not suggest that its conduct was influenced, at any time, by any advice from the Office of Price Administration. Moreover, the inspector had no power to bind the Office of Price Administration. Revised Procedural Regulation No. 1, §§ 1300.51–1300.52, 7 Fed. Reg. 8961, 8965, amended 8 Fed. Reg. 3313; cf. *Nichols & Co.* v. *Secretary of Agriculture*, 1 Cir., 131 F. 2d 651, 658, 659, reversed on other grounds, 136 F. 2d 503" (150 F. 2d at p. 275).

[5] § 1300.52 (b) *Interpretation to be written; authorized officials.* Official interpretations shall be given only in writing, *signed* by one of the following officers of the Office of Price Administration: the Price Administrator, the General Counsel, any Associate or

Section 1300.51–1300.52 (7 F. R. 971, 3663, 5776, effective November 4, 1942), who had authority to issue and *sign* the instruction contained in the letter of March 12, 1943, the doctrine of estoppel against the Administrator cannot come into play (*Rainbow Dyeing & Cleaning Co., Inc.* v. *Bowles, supra,* footnote 5; *Bowles* v. *Indianapolis Glove Co.,* 150 F. 2d 597 (C. C. A. 1945). In the last mentioned case, it was said:

> Defendant's last contention is of estoppel. It bases this argument on the conduct of the Administrator in inducing it, for a part of the period complained of, to sell its gloves at prices now charged to violate the law. A similar argument was presented to the Emergency Court of Appeals in the case, *Wells Lamont Corp.* v. *Bowles,* 149 F. 2d 364. The court, speaking through Judge Lindley, said, "It must be presumed that complainant was advised of the procedure it was required to follow in order to obtain an official interpretation upon which it could properly rely. And, since it failed to comply with the prescribed method, it is not entitled to rely upon unofficial oral advice given by subordinate officials in the Office of Price Administration. At first blush, this may seem harsh but, obviously, the Administrator cannot be bound by various oral interpretations which happen to be made by his hundreds, perhaps thousands, of employees, in violation of pub-

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Assistant General Counsel, any Regional Attorney, any Regional Price Attorney, any State Attorney, or State Price Attorney and any Chief Attorney or Chief Price Attorney for a District Office. [Italics ours.] In this case the letter was signed by Mr. Snow, Chief Enforcement Officer, who held an office not included among those authorized to sign.

lished regulations. He has prescribed a reasonable procedure by which persons subject to the regulations may obtain official interpretations by which all will be bound. Complainant is not entitled to rely on an unofficial interpretation." That part of the advice relied upon by defendant in the case at bar to sustain its charges of estoppel was in writing makes it no more binding upon the Administrator than the oral advice in the Wells case.

See also: *Nichols & Company* v. *Secretary of Agriculture,* 131 F. 2d 651, 659 (C. C. A. 1st, 1942); *Bowles* v. *Sisk,* 144 F. 2d 163 (C. C. A. 4th. 1944).

III

The third affirmative defense is that the action was instituted without authority of the Administrator (R. 14).

The Administrator's delegation of the authority to institute suits, to, *inter alia,* the Regional Enforcement Attorney or his delegate, was made in Revised General Order 3 (8 F. R. 116), issued June 10, 1943 (R. 274), and suit was instituted here pursuant to that authority on July 31, 1943 (R. 8). In addition, the suit was ratified by the Administrator on September 7, 1944 (Second Revised General Order 3, 9 F. R. 11137) (R. 277).

The District Court's previous ruling in *Bowles* v. *Wheeler,* was urged upon it by defendant in this case (R. 270) and adopted in the Court's finding that the bringing of this action was unauthorized (Finding XVI, R. 26). After the trial of the instant action, *Bowles* v. *Wheeler* was reversed on appeal, — F. 2d

— (No. 10,924, decided August 1, 1945). This Court's conclusion in the *Wheeler* case that the suit was properly instituted and authorized by the Administrator is, of course, dispositive of the same issue raised here.

IV

The fourth affirmative defense was that sales made by defendant subsequent to the effective date of MPR 244 to the purchasers named in Paragraph VI of the complaint, namely, Tuerck-MacKenzie Company, Willamette Iron and Steel Company and Bingham Pump Company, were made subject to an agreement that the sales were to be invoiced at those higher prices which defendant claimed it was entitled to charge, on the understanding that the amount of each invoice representing the excess over the price which plaintiff claimed was the established price would be withheld by the purchaser pending the final determination of defendant's application for an adjustment; and that defendant's action in fixing said price was not a wilful violation or disregard of the Regulation nor the result of defendant's failure to take practicable precautions against a violation (R. 15). There are many reasons why this defense of good faith and the taking or practicable precautions is lacking in merit.

1. Section 1421.156 of MPR 244 allows for adjustable pricing *provided an application for adjustment is pending.* (See, infra, pp. 59–60.) Defendant has made no claim that it was unaware of this condition. Yet, in the instant case, the contracts containing adjustable pricing were entered into with Tuerck-MacKenzie Company, Willamette Iron and Steel Company, and Bing-

ham Pump Company in the early part of November, 1942 (findings VIII and XI, R. 22–23) on or about April 14, 1942 (R. 118, 126, 188) and adhered to even though application for adjustment was neither filed nor *not* yet pending as was required first by the GMPR and Procedural Regulation 6 and thereafter by MPR 244. This factor alone would impeach defendant's belated cry of good faith and the taking of practicable precaution, particularly where one of the co-owners of the defendant, Mr. Card was a certified public accountant (R. 233), who was fully aware of the defendant's obligations under the Regulations and constantly in touch with representatives of the Office of Price Administration who were trying to bring him into compliance (R. 218–219).

2. Since the instances under which the charging of the requested overceiling price is permitted constitutes an exception to the general rule of the Regulation establishing maximum prices, the condition which the Administrator has imposed (namely the filing of an adjustment) must be strictly adhered to if the privilege of adjustable pricing is to be made available at all. Here, although the adjustment procedure could have been exercised under the GMPR and Procedural Regulation 6 in July 1942 and under MPR 244 in October 1942, defendant first filed its application for an adjustment on March 10, 1943. Meanwhile as shown above, defendant's unlawful agreement which went into effect in November 1942 was continued from that time until the present date. The overcharges contemplated by these agreements were not discontinued even after the adverse decision on

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September 28, 1944, by the Emergency Court of Appeals denying the application for adjustment, although Section 1421.156 of MPR 244 expressly provides that if the order of the Administrator denies the application, the contract price shall be revised downward to the maximum price ordered. In the face of these undisputed facts to say that defendant acted in good faith is absurd. Far from exercising good faith and taking practicable precautions against violations, defendant's persistent refusal to act under the GMPR or MPR 244 constitutes nothing less than wilful violation and complete disregard of the price regulation.

3. If the objection is that the Administrator acted arbitrarily in allowing adjustable prices only where a pending application for adjustment had been made, and by prohibiting similar agreements if the application for adjustment was not made, the answer is that this constitutes a challenge to the validity of the Regulation which cannot be made here. (Cases cited, pp. 23–24, Cf. *Speten* v. *Bowles,* 146 F. 2d 602 (C. C. A. 8th, 1945) cert. denied April 23, 1945).[6] For the purposes of this suit the Regulation must be accepted as valid, and that being so, "obedience was owing while the order was in force" (*Atlantic Coast Line Co.* v. *State of Florida,* 295 U. S. 301, 311).

4. In view of what has just been said, it is not material here to go into the question as to whether the Administrator acted arbitrarily in issuing the Regu-

[6] There, appellant attempted to challenge the unfairness of a regulation in allowing regular dealers in farm equipment to add shipping charges to the base period price while denying the same right to those, like appellant who were not regular dealers.

lations involved in this case. Yet it would not be amiss to point out that the Administrator was fully justified in making a distinction between a dealer who agrees to invoice at prices in excess of ceiling while an adjustment is pending, and a dealer who issues similar invoices even though an adjustment is not pending. In the first case, the dealer is proceeding in an orderly way according to law. This in and of itself is proof of good faith. In the second case his conduct flaunts the legal process and he is acting in direct violation of the law; and such conduct is by no means a badge of good faith. There is also a practical difference, apart from the legal distinction between both courses of action which the Administrator recognized in prohibiting invoicing of sales at overceiling prices unless and until an adjustment was pending. The Administrator knew that parties might be perfectly willing to contract at overceiling prices in the hope that if discovered, they could always point to the face of their written contract as proof of their honorable intentions. Many purchasers in need of a ready source of supply during a scarce market might not hesitate to be a party to an agreement of this character on the theory that their overpayments in any event could be passed on to other purchasers equally anxious to obtain goods. And it is precisely by that course of action that the floodgates of inflation are opened.

One overcharge in the chain of sellers is bound to beget another[7] and "—successive trickles grow into

[7] Thus, for example, in a letter dated July 20, 1942, Tuerck-MacKensie Co., one of the larger purchasers from defendant,

torrents which sweep away the dam" (*Brown* v. *Mars,* 135 F. 2d 843, 849 footnote (C. C. A. 8th, 1943) cert. denied 65 S. Ct. 368). If the seller refrained from applying for an adjustment for a sufficiently long enough period, the war might be over, OPA would be abolished, and the parties could then work out their claims against each other as if price regulation had not existed. Also, in the absence of an application for adjustment it would be easy in the course of a long running account to manufacture all kinds of excuses for getting the overcharges back from the purchasers who had withheld them, or retaining them if the purchasers had paid them by means of illegitimate offsets of one kind or another. With the institution, however, of adjustment proceedings, the parties to the transaction soon know exactly where they stand, what amount is owing and the date when it is due, and their records which are subject to inspection reflect it. Once adjustment proceedings are instituted therefore, price control is far less subject to manipulation and evasion than where no adjustment proceeding is on file. At the same time it immediately tends to protect an innocent purchaser or seller who in good faith is trying to comply with the Regulation. It also prevented the war effort from being impeded, since the chief purposes of MPR 244 and Procedural Regula-

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wrote the Office of Price Administration that "the castings which we have been buying from Crawford & Doherty for several years constitute the major part of the cost of the finished article, and it will be impossible to buy them at the increased price * * * unless we are allowed to make similar raises in our ceiling prices" (R. 116).

tion No. 6 in providing for adjustable prices were to prevent any interruption in the flow of goods for war purposes because of price controversies between buyer and seller, and to save defense appropriations from being dissipated by excessive prices.

Accordingly, defendant's well designed delay in filing an adjustment could result only in frustrating these purposes, and sharply rebuts the claim of good faith or taking of practicable precautions.

The withholding of the overcharge by the purchasers is not evidence of defendant's good faith or failure to take practicable precautions

5. Surely, the mere fact that the purchaser withheld the overcharge does not constitute good faith and the exercise of practicable precautions "against the occurrence of the violation." The violation consisted of invoicing the sales at higher prices than the established maximum price and delivering the same at a time when the adjustment was not pending. In the absence of a pending application for adjustment, Section 1421.151 of MPR 244 controlled. This Section, read together with Sec. 1421.166, provides that on and after October 26, 1942, a person is prohibited, *regardless* of any *contract,* agreement, or other obligation, to *sell* or *deliver* gray iron castings at a price higher than the maximum price paid by the same purchaser during the base period (August 1, 1941, to February 1, 1942) and likewise is forbidden from agreeing, *offering,* soliciting, or *attempting* to do any of the foregoing. (See, infra, pp. 59, 61). Obviously when the sale was invoiced at a price higher than the established maximum price and the commodity delivered pursuant to such sales invoice, the Regulation

was violated. This view is also fortified by reference to the Act.

Section 205 (e) of the Act provides:

> If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the *overcharge* * * * [Italics ours].

The right of action under this section accrues against a seller who violates a maximum price regulation by overcharging. The section defines "overcharge" as:

> * * * The amount by which the consideration exceeds the applicable maximum price * * *

The "consideration" referred to in this definition does not have to be paid by the buyer. This conclusion is confirmed upon a reading of Section 302 (b) of the Act which defines price as:

> The term "price" means the consideration *demanded* or received in connection with the sale of a commodity. [Italics added.]

From a reasonable reading of this section, therefore, it is apparent that if a seller merely *demands* an overceiling price, he has "overcharged" within the meaning of 205 (e). It is then immaterial that the purchasers in this case have always retained the overcharges. Payment in whole or part is not in any way essential or a prerequisite for making the

transaction unlawful. The regulation may be violated even if no payment whatever is made once the parties deliver any commodity at a price in excess of the established ceiling price. If the withholding of the *entire* payment is unimportant so far as *criminal* liability under the Act is concerned (*United States* v. *Lutz,* 142 F. 2d 985 (C. C. A. 3rd, 1944),[8] the withholding of *partial* payment can be of no consequence in a *civil* action.

V

The fifth affirmative defense is that all of defendant's castings were of the same kind, grade, specifications, etc., sold to purchasers located in the same area and therefore all purchasers were in the same general class; that after the issuance of the GMPR defendant, acting in good faith, was attempting to determine the applicability of the maximum prices

[8] In the *Lutz* case, *supra*, the defendant was charged and found guilty of having "bought and received" potatoes at prices above the permitted maximum. On appeal defendant claimed that the transaction was a sale for cash and that *since the cash had not been paid* for the potatoes at the time when the OPA agent interceded, title never vested in the defendant and therefore he cannot be said to have "bought them." The Circuit Court dismissed this contention as untenable. See also, *Bowles* v. *Leventhal* (S. D. N. Y., Civ. No. 26–113, March 1945), 3 OPA Op. & Dec. 2017, where defendant in resisting an action for treble damages claimed that as to one shipment he should not be held liable because the shipment had been returned and the money refunded. Notwithstanding this rescission, Judge Knox held him to be liable in treble damages and declared that otherwise it would "* * * place the rights of the Administrator at the mercy of black market sellers and buyers, and they would be enabled, in some cases, utterly to frustrate the remedial purposes of the statute."

fixed by said Regulation as the same related to the various purchasers of the defendant during the time the Regulation was in effect; that during said period defendant's officers conferred with representatives of the Portland office for the purpose of informing themselves as to the applicability of said price; that prices were fixed in good faith and with full intention of complying with the Regulation.

The first part of this defense restates the major contention of defendant that the purchasers named in the complaint were of the same class as the Marine Electric Company. This contention has been fully answered at pages 14 to 22 of this brief.

The second part of this defense which refers to conferences held with representatives of the Office of Price Administration, and defendant's alleged good faith and intention of complying with the regulations has been discussed in this brief at pages 25 to 27.

We think it is plain there is no merit whatever to any part of this defense.

II

Since defendant's conduct was wilful and since it failed to take practicable precautions against the occurrence of the violations, the proper measure of damages is treble the amount of overcharges

Since the district court held that the Regulations were not violated, it had no occasion to determine the proper measure of damages in this case. It becomes appropriate to turn to this question now.

Under Section 205 (e) of the Act as originally enacted, the amount of the recovery, if it was once

established that a price violation had taken place, was definitely fixed at three times the amount of the overcharge, or $50, whichever was greater, regardless of extenuating circumstances (*Bowles* v. *American Stores,* 139 F. 2d 377 (App. D. C., 1943) cert. denied, 322 U. S. 730). Section 205 (e), however, was amended on June 30, 1944, by Section 108 (b) of the Stabilization Extension Act of 1944 (Public Law 383, 78th Cong., 2d Sess.) so as to permit a defendant to reduce the amount of the recovery upon a showing that the violations were neither wilful nor the result of failure to take practicable precautions to avoid their occurrence. (See Appendix to Brief, p. 56.) Absolute liability for at least the amount of the overcharge, or $25, whichever is greater, was, however, provided for, even in the event *both* of the aforementioned elements were established (*Augustine* v. *Bowles,* 149 F. 2d 93 (C. C. A. 9th, 1945)). This amendment was made applicable to proceedings "pending" on the date of enactment as well as to proceedings instituted thereafter. Defendant availed itself of the privilege provided by this change in the Act by amending its pleadings as to allege that as to sales made by it subsequent to the effective date of Maximum Price Regulation 244 to the purchasers named in Paragraph VI of the complaint, defendant's action in fixing prices was not a wilful violation of, or disregard of, said price regulation, nor was said price the result of defendant's failure to take practicable precautions against a violation (R. 15).

And the district court found the following in Finding XV (R. 25).

> The Court further finds that during all said times the violations of the above-mentioned price regulations, order or price schedules by said defendant were neither wilful nor the result of failure to take practicable precautions against the occurrence of the violations.

It is not clear whether the words "all said times" in this Finding refer not only to the alleged violations during which Maximum Price Regulation 244 was in effect, but likewise the General Maximum Price Regulation. Significantly, defendant did not interpose this defense respecting those sales made by it during the period that the General Maximum Price Regulation was operative, i. e., May 11, 1942 to October 26, 1942 (referred to in Par. IV to VI of complaint, R. 20–21). It merely confined the defense to alleged violations of Maximum Price Regulation 244, effective October 26, 1942 (R. 15). But for the purpose of discussion, we shall assume that the court intended to include in the phrase "all said times" the entire period covered by the complaint. The record is then in a state from which this Court may properly determine what the measure of damages shall be.

Under the amendment to Section 205 (e), it is settled that it is the violator seeking to avoid the assessment of damages beyond the amount of the overcharge who has the burden of pleading and proving that the violation was neither wilful nor the result of failure to take practicable precautions (*Bowles* v. *Sharp,* 149 F. 2d 148 (C. C. A. 8th, 1945); *Bowles* v. *Hastings,* 146 F. 2d 94 (C. C. A. 5th, 1944);

Bowles v. *Franceschini,* 145 F. 2d 510 (C. C. A. 1st, 1944)).

If wilfulness is shown to be present, then there is no more discretion vested in the district court under Section 205 (e) as amended to grant less than treble damages than there was prior to amendment. Congress obviously intended that the court might assess something less than treble damages only "in cases where violations occur unintentionally and despite the exercise of due diligence to prevent them" (Senate Banking and Currency Committee Report #922, 78th Cong., 2d Sess., p. 14. See also, Statement of Senator Wagner, in explanation of changes in Bill, 90 Cong. Rec. 5380). There was no intention whatever of saving anyone from treble damages who was a wilful violator and who failed to take practicable precautions. Senator Chandler, after whom the instant "Chandler defense" is named, made this plain as follows:

> The case would go to court, and the allegation of an overcharge would be made. A violation of the OPA regulations would be alleged. The defendant in the case would prove, if he were able, that the overcharge were not wilful * * * He would also prove, if he could, that he used every reasonable precaution to try to observe regulations of the OPA. If he could not prove it he would lose, as he ought to lose. *It is not my intention to protect anyone who wilfully violated the law, or does not take reasonable and practical precautions to observe* the regulations (90 Cong. Rec. 5473). [Italics supplied.]

Reaffirming his intention not to aid the wilful violator by his amendment, Senator Chandler said:

> I place two burdens upon the defendant both of which he must bear: first, that he did not wilfully commit the act. That is a matter of proof. *If he cannot prove that he did not wilfully commit the act he is stuck,* and I will not make a plea for him. Unless he is able to prove that he took all practicable precautions by reading the regulations to his employees and by trying to acquaint them with the regulations, he has not exhausted his responsibilities and good intent. It seems to me that if we do not agree with that contention we are not being fair to the American people (90 Cong. Rec. 5474). [Italics supplied.]

Not only is there lacking a single expression of intent to reduce the previous liability of a wilful violator, but on the contrary there was complete unanimity among those members of Congress who expressed themselves that intentional violations should continue to bear the full brunt of the treble damage provision.

Thus Senator Lucas declared:

> The individual who knowingly and wilfully violates the directives of the Office of Price Administration, or the regulations or orders promulgated by it, should be penalized. So far as I am concerned in time of war there is no criminal penalty or damages heavy enough to be laid upon that kind of an individual (90 Cong. Rec. 5468).

Senator Radcliffe, a member of the Banking and Currency Committee, agreed with Senator Lucas, saying:

> Under the present law if a case goes to trial and the overcharge is found to be a certain amount, the court has no discretion whatever except to assess triple damages. The court may come to the conclusion that there were extenuating circumstances, and that the imposition of triple damages would be unreasonable, but under the law there is no such judicial discretion. The Committee has attempted to cure that situation by providing that the damages may be from one and one-half to three times the amount of the overcharges, in the discretion of the court. *In cases where there has been a deliberate and flagrant attempt to flout the law, then, as the Senator from Illinois said a moment ago, triple damages should be imposed upon the one who has made the overcharge* (90 Cong. Rec. 5469). [Italics supplied.]

These statements made in the Senate by the author of the amendment and members of the Committee which reported it are entitled to great weight in determining its scope and purpose. So too, simple justice and the requirements of our emergency economy demand that the statute must be construed in such a manner as would not allow a deliberate violator to obtain the same benefits intended to be accorded the person whose conduct was not wilful and who took practicable precautions to avoid a violation.

The Eighth Circuit Court of Appeals has recognized the principle that a wilful violator should pay treble

damages. In *Bowles* v. *Sharp* (1945), 149 F. 2d 148, the Court said, at page 149:

> We think the appellee should be given an opportunity, if he so requests, to offer evidence under the amendment. Unless further evidence shall be introduced judgment should be entered against the appellee for $801.63 and costs as prayed. * * *

In *Bowles* v. *Biberman* decided September 21, 1945 (C. C. A. 3d) which was an action under Section 205 (c) of the Act as amended, and for injunction under Section 205 (a) of the Act, the court reversed the district court and instructed it to enter judgment for an injunction and for full treble damages against the defendant who violated a regulation in the face of two warnings that its acts were not permitted by it. The view that the assessment of damages is not discretionary in the case of a wilful violation has also been upheld in *Bowles* v. *Krasno Brothers Glove & Mitten Co.* (E. D. Wis., 1945) 59 Fed. Supp. 581, where the court said:

> * * * Clearly the defendant in the case at bar did nothing to change its sales practice or avoid what was, as stated hereinbefore, in fact a violation. Therefore, the court has no discretion in the award of damages and must order treble damages.

In the light of these comments and authorities and also the evidence to be discussed below, we submit that

*"Wilful," as used in the Act does not necessarily involve bad faith or bad purposes; it means merely "purposeful" or "obstinate" as distinguished from "accidental." (See, *Zimberg* v. *United States*, 142 F. 2d 132, 137 (C. C. A. 1st, 1944) cert. denied 65 S. Ct. 38.

defendant should be held liable for treble damages. Here, it not only failed to sustain the burden imposed upon it by the Act but, with all deference to the court below, its conduct was in complete disregard of the Regulations almost from the time price control went into effect, until the day of the trial, and for that matter, under the lower court's approval is still in violation. We think a summary of defendant's conduct in chronological form, although somewhat repetitious of what went before, will suffice to make this clear beyond a shadow of a doubt.

(1) April 14, 1942—defendant revised its prices on sales made to the purchasers named in complaint.

(2) May 11, 1942—the GMPR went into effect making March 1942 the base period.

(3) July 1, 1942—Procedural Regulation No. 6 went into effect,[9] allowing a dealer like defendant to

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[9] Procedural Regulation No. 6 issued July 1, 1942 (7 F. R. 5087), as amended, reads (§ 1300.401):

"Any person who has entered into or proposes to enter into a government contract or a subcontract under any such contract, who believes that an established maximum price impedes or threatens to impede production of a commodity or supply of a service which is essential to the war program and which is or will be the subject of such contract or subcontract may apply for adjustment of that maximum price in the manner set forth below.

* * * * *

"After an application has been filed and pending the issuance of an order granting or denying the application, the applicant may enter into or offer to enter into contracts and may make deliveries at the price requested in the application. If the order issued denies the application in whole or in part, the contract price shall be revised downward to the maximum price ordered, and if any payment has been made at the requested price, the applicant may be required to refund the excess. * * *"

With the exception of a few regulations which are expressly named, Procedural Regulation No. 6 applies to nearly all of the

contract to sell upon an adjustable price plan provided an application for adjustment was filed; and shortly thereafter defendant was advised to comply with the Regulation.

(4) September 14, 1942—defendant was advised by letter (R. 256–257) that prices to Willamette Iron and Steel Company were prices at which deliveries were made to that company in March and that "This price can be increased only on the basis of an application for adjustment" (R. 257) pursuant to Procedural Regulation No. 6.

(5) October 26, 1942—MPR 244 went into effect superseding the GMPR. Under it, like the GMPR, in conjunction with Procedural Regulation No. 6, defendant was allowed to sell under an adjustable price plan provided he filed an application for adjustment. No application was filed until March 10, 1943, but nevertheless defendant continued to sell in the interim at adjustable prices which were higher than the ceiling price. (See Findings VIII, XI, R. 22, 23.)

(6) March 10, 1943—defendant filed its application for adjustment.

(7) March 12, 1943—defendant was advised by Mr. Snow, Chief Enforcement Attorney of Portland, Oregon, that "application cannot be *acted* upon to permit you to quote the prices you request in your application until you have made a satisfactory adjustment on your past overcharges" (R. 255).

"In the meantime the Price Division permits me to say that they have already started to make an analysis

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regulations which have been issued by the Administrator covering those commodities which were of use in the war effort.

of your application" (R. 256). (Note—no violations were charged in complaint after March 10, 1943.)

(8) April 2, 1943—(three weeks later) Mr. Snow advised defendant that it was now entitled to charge the prices requested in the application for adjustment.

(9) November 2, 1943—application for adjustment was denied by Administrator.

Section 1400.156 of MPR 244 requires party whose application for adjustment is denied by the *Administrator,* to revise the contract downward to the maximum price ordered.

Defendant did not obey the provisions of MPR 244 either when the Administrator denied the application on November 2, 1943, nor did it bring itself into compliance after the Emergency Court of Appeals upheld the Administrator's order on September 28, 1944 (146 F. 2d 661 (E. C. A. 1944)) or thereafter.

(10) December 5, 1944 (trial date in this case) defendant admitted that ever since April 1942 it has maintained the prices raised at that time for the purchasers named in the complaint and is still charging them (R. 259).

In other words, for a period of over two years defendant has consistently flouted the Act and Regulations and intends to continue to do so (R. 259). Surely, "good faith" within the meaning of Section 205 (e) of the Act has not been shown merely because the purchasers in this case have been allowed to retain the overcharges under an agreement providing for adjustable prices. As shown above, for the period referred to in the complaint, these contracts were unlawful because under the express terms of the regulation they called for prices higher than the

established prices at a time when an application for adjustment was not filed nor pending.

While Section 205 (d)[10] provides for no liability where anything is done or omitted to be done in "good faith * * * pursuant to * * * any regulation," this defense is not available to one whose action or omission is not *"pursuant"* to the regulation but is directly opposed to it (*Bowles* v. *Indianapolis Glove Co.,* 150 F. 2d 597 (C. C. A. 7th, 1945); *Bowles* v. *Franceschini,* 145 F. 2d 510 (C. C. A. 1st, 1944)). *In Bowles* v. *Franceschini,* supra, the Court said:

> The purpose of this section [sec. 205 (d)] is to protect those who act "pursuant to" the provision of, or regulations under the Act as distinguished from those who "violate" it. It does not appear that the sales made in good faith in the instant case were made "pursuant to" any provision or regulation under the Act. * * *

If there was no "good faith" present within the meaning of Section 205 (d), that element was lacking also for the purposes of Section 205 (e). So far as practicable precautions were concerned to prevent the occurrence of violations as required by Section 205 (e), it is plain that defendant has taken every precaution to perpetuate his wrongful acts instead of taking

[10] (d) No person shall be held liable for damages or penalties in any Federal, State, or Territorial court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administration and Civilian Supply * * *.

pains to avert them. We submit that treble damages would not be too high a price to pay by a defendant who has so deliberately and callously disregarded an Act "born of the exigencies of war" for the protection of the public against inflation. (See *Taylor* v. *United States,* 142 F. 2d 808, 817 (C. C. A. 9th, 1944), cert. denied, 65 Sup. Ct. 56.) "The case is not therefore one in which a party acted in innocent confusion, but rather one in which, with deliberate awareness of the conflict, it elected to submit its rights to the court. In such a case it is our duty to let the chips lie where they fall" (Groner, C. J., concurring in *Rainbow Dyeing and Cleaning Co., Inc.* v. *Bowles,* supra).

III

Defendant's violations fully justified an injunction

In this case the district court held that the prayer for injunction fell with the dismissal of the action (R. 290). Apparently, since the court found that defendant had not violated the Act and Regulations, it believed no injunction was necessary to assure future compliance. This then, is not a case where the court attempted to exercise any discretion, and so the question of abuse is not present.

Under the circumstances, however, we submit that an injunction is essential to bring defendant into compliance. This is not a case where the alleged unlawful practices have been abandoned with a promise from defendant that there will be no resumption of them, which promise the court believes will be performed. Here the challenged practices are still continuing and defendant persists to this day in main-

taining that they are lawful.[11] Not only has defendant taken no vigorous or positive steps to discontinue or correct his omission to comply with the Act, as Maximum Price Regulation 244 required it to do where an adjustment is denied, but defendant makes no promise that it will do so, even if this appeal is decided adversely to it. In view of such defiance, failure to issue an injunction would be "tantamount to judicial expression of acquiescence in and toleration of the unlawful conduct, and no such discretion is vested in the court." (Cf. *Lenroot* v. *Interstate Bakeries Corporation,* 146 F. 2d 325, 329 (C. C. A. 8th, 1945), even if it had so been exercised in this case.

The principle to be applied in a case of this kind was well stated in *Walling* v. *Panther Creek Mines,* 148 F. 2d 604 (C. C. A. 7th, 1945), where Judge Kerner said (605):

> * * * We emphasize the point that this is not a case where the alleged unlawful practices have been abandoned, and compliance effected, with the promise that they will not be resumed. On the contrary, the challenged practices are continuing, and defendant asserts that they are lawful. No promise has been made to discontinue or correct them. The trial court was of the opinion that the defendant may have committed violations of

[11] The fact that defendant vigorously defended its past conduct is of itself a sufficient threat that it will violate in the future as to warrant the issuance of an injunction. (*Sears, Roebuck & Co.* v. *Federal Trade Commission*, 258 Fed. 307 (C. C. A. 7th, 1919); *Otis & Co.* v. *Securities & Exchange Commission*, 106 F. 2d 579 (C. C. A. 6th, 1939); *Fleming* v. *Jacksonville Paper Co.*, 128 F. 2d 395 (C. C. A. 5th, 1942)).

the Act, and if it did, the violations were only "technical." Thus the question boils down to whether the practices are illegal, for if they are, since the standards of the public interest, not the requirements of private litigation, measure the need for injunctive relief, an injunction should be issued.

In *Bowles* v. *Meyers,* 149 F. 2d 440 (C. C. A. 4th, 1945), Judge Parker said with equal cogency (at p. 444):

> The principle upon which the foregoing cases were decided has no application here, where defendants have made no attempt to comply with the order but have acted, and are continuing to act, in defiance of its provisions under claim that the director in making it has not complied with the provisions of the statute. Equitable considerations arising out of an attempt to comply with regulations might well convince a court that injunctive relief ought not be granted; but a refusal to obey regulations because they are thought to be invalid by one who does not adopt any of the means open to him of testing their validity falls within an entirely different category. *Bowles* v. *Nu Way Laundry Co.,* supra.

In *Bowles* v. *Biberman,* supra, Judge Biggs, speaking for the Third Circuit Court of Appeals, said:

> The defendant has persistently violated the Act though it has now ceased to do so. It committed its violations after two warnings from the Administrator that its charge of the 8½% wage increase into its direct labor costs was not permitted under the Regulations.

> True, it ceased these violations on January 29, 1944, about four months before the complaint in the suit at bar was filed. * * * Since the defendant engaged in acts prohibited by the statute the court below erred in not granting the injunction.
>
> The judgment is reversed and the cause is remanded with the direction to enter judgment for the plaintiff in accordance with the principles enunciated in this opinion.

Here there is even greater need to grant the injunction because defendant continued to violate the regulation after its application for adjustment was denied and after it had an opportunity to test its validity. In the words of this Court in *Bowles* v. *Sanden & Ferguson, Inc.,* supra, "The proof shows a complete disregard of the regulations with no situation comparable to *Hecht* v. *Bowles,* and * * * judgment should be reversed and the case remanded, with instructions to issue the injunction prayed for." (See also, *Bowles* v. *Simon,* 145 F. 2d 334 (C. C. A. 7th, 1944); *Bowles* v. *Nu Way Laundry Co.,* supra).

CONCLUSION

The gray iron castings industry in the prosecution of the war effort was of utmost importance. It is of equal importance for purposes of postwar rehabilitation. This commodity is used extensively in machine tools, engines, various types of machinery and mechanical equipment and many other products. In 1941 total sales of gray iron castings were estimated to be nearly 500 million dollars.[12] As a purchaser, directly

[12] Statement of Considerations for MPR 244, OPA Service 38:891 et seq.

or indirectly of these commodities for war use, the government had a real interest in preserving ceiling prices for them. Every unauthorized increase resulted not only in a wrongful taking of the public's money but likewise in a diversion of funds which could be used to finance the myriad number of other important war and peacetime requirements. The public is even more directly affected by any unauthorized increase in the price of castings now. The need for drastic price control and enforcement is therefore essential here. Only treble damages and an injunction will deter a violator of defendant's character and others like it. There is far too much at stake to take any other course of action.

It is therefore respectfully submitted that the judgment of the district court should be reversed, and the cause remanded, with instructions to grant the full relief prayed for in the complaint.

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APPENDIX A

Analysis of Overcharges and Treble Damages From March 27, 1942, to March 10, 1943

Name of purchaser	Period of violation	Amount of overcharge	Calculated treble damages	Record reference	Finding of fact
Tuerck-MacKensie Co.	Aug. 21, to Oct. 26, 1942.	$1,535.16	----------	R. 75 Ex. 8 [3]	cf. Finding VI R. 21.
	Oct. 28, to Dec. 20, 1942.	1,060.27	----------	R. 76 Ex. 9 [3]	Finding IX R. 23.
	Jan. 14, to Feb. 27, 1943.	[1] 723.99	----------	R. 78 Ex. 10	
	Total	$3,319.22	$9,957.66		
Bingham Pump Co.	Aug. 7, 1942, to Oct. 22, 1942.	2,036.23	----------	R. 85 Ex. 17	cf. Finding VI R. 21.
	Nov. 9, 1942, to Dec. 31, 1942.	1,953.56	----------	R. 84 Ex. 15	Finding X R. 23.
	Jan. 5, 1943, to Mar. 10, 1943.	1,315.82	----------	R. 84 Ex. 16.[3]	
	Total	5,305.61	15,916.83		
Willamette Iron & Steel Corp.	Oct. 26, 1942, to Dec. 31, 1942.	3,646.20	----------	R. 88 Ex. 20, 21.[3]	
	Total	3,646.20	10,938.60	----------	Finding XII R. 24.
Iron Fireman Mfg. Co.	Mar. 27, 1942, to Dec. 30, 1942.	[2] 3,897.51	----------	R. 94 Ex. 24	cf. Finding XIV R. 25.
	Total	3,897.51	11,692.53		
	Total overcharges.	16,168.54	48,505.62		

[1] Complaint amended to conform to proof (R. 184).
[2] Complaint amended to conform to proof (R. 94).
[3] Exhibits omitted from record by stipulation (R. 295).

APPENDIX B

PROVISIONS OF THE ACT AND REGULATIONS

The action involves the Emergency Price Control Act of 1942 (50 Stat. 23, 50 U. S. C. App. Sec. 925) as amended by the Stabilization Extension Act of June 30, 1944 (Pub. L. No. 383, 78th Cong.; 2nd Sess.), and two regulations issued thereunder, the General Maximum Price Regulation (7 F. R. 3153) and Maximum Price Regulation No. 244 as amended (7 F. R. 7871). The alleged violations are overcharges in the sale of gray iron castings between May 11, 1942, and March 11, 1943.

(1) *The statute.*—Section 2 (a) of the Act provides that when prices have risen or threaten to rise to an extent inconsistent with the purposes of the Act, the Price Administrator may by regulation establish such maximum prices as will be fair and equitable and will effectuate the purposes of the Act.

* * * * *

Section 4 (a) provides that it is unlawful regardless of any agreement made to sell or deliver any commodity in violation of any regulation under Section 2, or offer to do any of the foregoing.

* * * * *

Section 205 (a) provides that:

> Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a

showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

* * * * *

Section 205 (e) as amended by the Stabilization Act of 1944 (Pub. Law 383, 78th Cong., 2d Sess.) provides in part:

If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, *within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation.*[1]

[1] As amended by sec. 108 (b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language:

"* * * bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court."

** * * such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter.*[2]

Pursuant to the authority vested in him by Section 2 of the Act, the Administrator issued the regulations which are involved in this case.

(2) *Application of the General Maximum Price Regulation, hereinafter referred to as GMPR.*—As to violations alleged to have occurred from May 11, 1942, until October 26, 1942, the GMPR, issued April 28, 1942, and effective May 11, 1942 (7 F. R. 3153), was applicable.

The pertinent portions of this regulation are as follows:

> SECTION 1. *Prohibition Against Dealing in Commodities or Services Above Maximum Prices.*—On and after the effective date of this regulation, regardless of any contract or other obligation:
>
> (a) No person shall sell or deliver any commodity, and no person shall sell or supply any service, at a price higher than the maximum price permitted by this Regulation; and
>
> (b) * * *
>
> SECTION 2. *Maximum Prices for Commodities and Services—General Provisions.*—Except as otherwise provided in this Regulation, the seller's maximum price for any commodity or service shall be:
>
> (a) In those cases in which the seller dealt in the same or similar commodities or services during March 1942:
>
> The highest price charged by the seller during such month—
>
> (1) For the same commodity or service; or
>
> (2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it; or

[2] Sec. 108 (c) of Stabilization Extension Act of 1944.

(b) * * *

"Highest Price Charged During March 1942."

For the purposes of this Regulation, the highest price charged by a seller "during March 1942" shall be:

(1) The highest price which the seller charged for a commodity delivered or service supplied by him during March 1942;

* * * * *

No seller shall change his customary allowances, discounts, or other price differentials unless such charge results in a lower price. *The "highest price charged" shall be a price charged during March 1942 to a purchaser of the same class.*

(k) *Purchaser of the Same Class.* "Purchaser of the same class" refers to the practice adopted by the seller in setting *different prices* for commodities or services for sales to *different purchasers* or kinds of purchasers (for example, manufacturer, wholesaler, jobber, retailer, government agency, public institution, individual consumer) or for purchasers located in different areas or for different quantities or grades or under different conditions of sale. [Italics ours.]

(3) *Application of Maximum Price Regulation No. 244 (hereinafter referred to as MPR 244).*—As to violations alleged to have occurred from October 26, 1942 to March 11, 1943, MPR 244, issued October 24, 1942, and effective October 26, 1942 (7 F. R. 7871) was applicable.

The pertinent provisions of this Regulation are as follows:

§ 1421.151 *Maximum prices for gray iron castings.* (a) On and after October 26, 1942, regardless of any contract, agreement, lease or other obligation, no person shall sell or deliver gray iron castings, and no person shall buy or receive gray iron castings in the course of trade

or business, at prices higher than the maximum prices set forth in Appendix A hereof, incorporated herein as § 1421.166; and no person shall agree, offer, solicit or attempt to do any of the foregoing: *Provided,* That (1) if the purchaser shall receive from the seller a written affirmation that to the best of his knowledge, information and belief the price charged does not exceed the maximum price established by this Maximum Price Regulation No. 244 and that the seller has complied with all other provisions (including the filing requirements of § 1421.161) of this regulation, and if in such case the purchaser shall have no knowledge of the maximum price and no cause to doubt the accuracy of the affirmation, the purchaser shall have complied with this section; and (2) where the contract of sale has been entered into on or before October 25, 1942, the parties thereto may make and accept deliveries of the castings required or specified in such contract and the seller may render bills or invoices for such castings to the purchaser at the contract price, subject to adjustment of said price in accordance with the maximum prices established by this Maximum Price Regulation No. 244 within a period not to exceed 30 days after the billing or invoicing.

* * * * *

§ 1421.152 *Applicability of General Maximum Price Regulation.* The provisions of this Maximum Price Regulation No. 244 supersede the provisions of the General Maximum Price Regulation with respect to sales and deliveries for which maximum prices are established by this regulation.

§ 1421.156 *Adjustable pricing and pricing during the pendency of an application for adjustment or petition for amendment.* (a) It is permitted under this maximum price regulation to provide in a contract that the price shall be adjustable to a price not higher than the

maximum price in effect at the time of delivery.

(b) *Where an application for adjustment has been filed pursuant to § 1421.157 (a) of this regulation* and the applicant claims to meet the requirements of subparagraph (3) under paragraph (a) of said section, he may, pending the issuance of an order granting or denying the application and without securing the express permission of the Office of Price Administration, enter into or offer to enter into contracts and may make deliveries at the price requested in the application. In an appropriate situation, where a petition for amendment or application for adjustment requires extended consideration and the applicant or petitioner does not claim to meet the requirements of subparagraph (3) under § 1421.157 (a), the Administrator or, in a case properly before him, the regional administrator for the appropriate regional office of the Office of Price Administration may, upon application, grant permission to the applicant or petitioner to enter into or offer to enter into contracts and to make deliveries at the price requested in the application or petition. Whether or not the applicant or petitioner claims to meet the requirements of subparagraph (3) under § 1421.157 (a), if the order issued denies the application or petition in whole or in part, the contract price shall be revised downward to the maximum price ordered, and if any payment has been made at the requested price, the applicant or petitioner shall be required to refund the excess. If a request for review is filed by the applicant seeking an adjustment in accordance with § 1300.17 of Revised Procedural Regulation No. 1, the applicant, pending action by the Administrator, may enter into or offer to enter into contracts and may make deliveries at the price requested in the application. *If the order issued by the Administrator denies the application in whole or in part, the contract price shall be revised downward to the*

maximum price ordered, and if any payment has been made at the requested price, the applicant shall be required to refund the excess. [Italics ours.]

§ 1421.157 *Petitions and applications for amendment, adjustment or exception.* (a) Any seller of gray iron castings may file an application for adjustment of his maximum prices for any or all such castings: *Provided,* That he is prepared to show:

(1) That his maximum prices for such castings are below his costs of producing them, or are inadequate to maintain continued production of such castings, and

(2) That such castings are necessary to the war effort, and either

(3) That he has entered into or proposes to enter into Government contracts or subcontracts under such contracts for the sale of such castings, or

(4) That unless adjustment is granted applicant will cease or will not undertake production of such castings, and as a result the purchaser will be materially handicapped in its operations for one or more of the following reasons:

(i) Applicant possesses special knowledge and experience in the production of such castings,

(ii) No other foundry properly equipped to produce such castings is located within a convenient distance of purchaser,

(iii) There is a general shortage in the type of facility possessed by applicant for the production of such castings,

* * * * *

§ 1421.166 *Appendix A: Maximum prices for gray iron castings*—(a) *Base period maximum prices.** (1) Where the casting to be

*Examples of the method of computing base-period maximum prices are as follows: Assume that the seller sold or offered for sale

priced is identical with a casting which the seller sold or offered for sale in the period between August 1, 1941, and February 1, 1942, the maximum price for such casting is the highest net price at which the casting was sold or offered for sale by the seller during such period: *Provided, That the maximum price for such casting to a purchaser to whom the casting was sold or offered for sale by the seller in the period between August 1, 1941, and February 1, 1942, shall be the highest net price at which the seller sold or offered for sale the casting to such purchaser during such period.* As used in this paragraph (a), the term "net price" means the price at which the casting was sold or offered for sale, adjusted for the seller's applicable customary charges, discounts, quantity differentials, and allowances in effect between August 1, 1941, and February 1, 1942. [Italics ours.]

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in the period between August 1, 1941 and February 1, 1942 (hereinafter referred to as the "base period") to purchasers A and B, but not to purchaser C, a casting which is identical to the casting to be priced and that the highest net prices to purchasers A and B in the base period were 7¢ and 8¢ per pound, respectively. If the seller proposes to sell the casting to C, his maximum price is 8¢ per pound (subject to the provisions of § 1421.166 (a) (3) on overtime). The seller's maximum price to purchaser A would be 7¢ per pound and to purchaser B would be 8¢ per pound (subject to the provisions of § 1421.166 (a) (3) on overtime).

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